Supreme Court No. 98795-5

Court of Appeals No. 79335-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL DAVID SLATER,

Petitioner.

JOINT AMICUS CURIAE BRIEF OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE ACLU OF WASHINGTON, THE WASHINGTON DEFENDER ASSOCIATION, COLUMBIA LEGAL SERVICES AND THE KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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I. INTRODUCTION

Courts in Washington, and in other States, have considered whether a defendant's failure to appear at a pretrial hearing should be admissible at the defendant's trial on the original charge. Those that have upheld admission of such evidence reason that (1) failure to appear is the equivalent of "flight," (2) "flight" is circumstantial evidence that the defendant is conscious of the fact that he is guilty of the pending charge, and thus (3) a failure to appear is admissible because it is an implied admission of guilt.

The modern trend, however, is that absent evidence of an *actual* intent to flee or otherwise avoid prosecution, courts exclude evidence of a defendant's mere "failure to appear" ("FTA") in court.[1] Courts generally exclude such evidence because (1) FTAs usually have very minimal probative value,[2] (2) the unfair prejudicial impact of admitting evidence of FTAs is very high; (3) a practice of admitting such evidence encourages prosecutors to add, or to threaten to add, a charge of bail jumping in order to coerce guilty pleas; and (4) the proliferation of coerced guilty pleas to bail jumping disproportionally saddles poor defendants with a felony record that makes it even more difficult for them to find employment and housing, resulting in the criminalization and perpetuation of poverty.

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[1] *See, e.g., Guthrie v. State*, 222 P.3d 890, 894 (Alaska Ct. App. 2010): "Among the jurisdictions that follow the majority rule . . . ***we have found no case in which joinder has been upheld ... where a defendant who had attended earlier court proceedings missed a single court appearance but then, within days, voluntarily returned to court with his attorney.***") (Emphasis added).

[2] *See, e.g. State v. Ingram*, 196 N.J. 23, 47, 951 A.2d 1000 (2008) (unexplained failure to appear held to be "riddled with fatal ambiguity."); *Commonwealth v. Kane*, 19 Mass. App. Ct. 129, 137, 472 N.E.2d 1343 (1984) (argument that absence shows consciousness of guilt described as "plainly wrong").

The trial court relied on two cases that are more than four decades old. Amicus urges this Court to either distinguish or disapprove of them, and to hold that the practice of adding bail jumping charges to the original charge and then denying a motion to sever them is never (or, at the very least, almost never) appropriate. The general reason for favoring joinder and disfavoring severance is one of judicial economy and witness convenience. But witnesses necessary to prove the bail jumping are highly unlikely to be witnesses to the incident giving rise to the original charge. Thus, cost savings realized from joint trials will be less than usual, since there will not be witness overlap. While severances will cause some increase in cost because there will sometimes be two jury trials, the goal of cutting costs cannot be allowed to override defendants' right to fair trials. Moreover, by criminalizing FTA's that were caused by poverty, joint trials on bail jumping and other charges will pointlessly lead to the increased incarceration of the poor and thus to the perpetuation of a system that effectively punishes people for being poor.

II. ARGUMENT

A. THE INFERENCE THAT AN FTA SHOWS CONCIOUSNESS OF GUILT IS FREQUENTLY UNREASONABLE.

1. Not showing up for a hearing is not the same as moving to a different city or state.

"People miss court for many reasons, such as lack of transportation, conflicting childcare duties, and the difficult choice between maintaining employment or going to court." A. Johnson, *Decriminalizing Non-Appearance in Washington State: The Problem and the Solutions for*

Washington's Bail Jumping Statute and Court Non-Appearance, 18 SEATTLE J. FOR SOC. JUST. 433, 436 (Spring 2020). Research studies indicate that poor people are more likely to fail to appear in court.[3] As the Supreme Court of New Jersey has said:

> [A] defendant's … voluntary absence, standing alone, is probative of little. *Many different motives may lie behind a defendant's voluntary absence from trial, not all of them congruent with a consciousness of guilt.* Thus, because in many instances its probative value will be substantially outweighed by its devastatingly prejudicial effect, *see, e.g., N.J.R.E.* 403, in the main a defendant's voluntary but unexplained absence from trial, without more, should not give rise to a jury charge that his absence from trial constitutes evidence of consciousness of guilt.

State v. Ingram, 951 A.2d at 1015 (italics added).

The plethora of seemingly reasonable reasons for nonappearance ultimately caused this Court to strike down the first bail jumping statute on vagueness grounds.[4] The Legislature enacted a new version of the statute, removing "lawful excuse" for missing court as an element of the crime and providing an affirmative defense for "uncontrollable circumstances." If the defendant can prove that his FTA was caused by an uncontrollable circumstance, then his FTA is legally justified and he is not guilty. This

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[3] H. Zettler & R. Morris, *An Exploratory Assessment of Race and Gender – Specific Predictors of Failure to Appear in Court Among Defendants Released Via a Pretrial Services Agency*, 40 CRIM. JUST. REV. 417, 418-19 (2015). The correlation between poverty and failure to appear is likely due to a relative lack of reliable transportation and to the risk of losing one's employment by missing work in order to attend court.

[4] When first enacted, the bail jumping statute required the State to prove that the defendant had no "lawful excuse" for failing to appear. But defendants made all kinds of "lawful excuse" arguments. Given the absence of any statutory definition of that term, this Court held that because "predicting its potential application would be a guess, at best" the inescapable conclusion was that the statute was unconstitutionally vague. *State v. Hilt,* 99 Wn.2d 452, 455, 662 P.2d 52 (1983).

statutory change did not change the fact that there are many causes for failures to appear. But it did drastically reduce the number of explanations that qualify as a legal defense to the charge.

Washington criminal defense attorneys confirm that there are many reasons why defendants, especially indigent defendants, fail to appear at pretrial hearings. Despite their plight they almost never prevail using the statutory defense. *Decriminalizing Non-Appearance, supra*, at 466.[5]

2. One of the most common reasons for an FTA is that the defendant simply forgot about the court hearing.

The explanation given in many cases – "I forgot" – is not a defense. Everyone, even attorneys, occasionally forget that they have a scheduled court hearing and miss it. But it is well established that "I forgot" is not a defense to the charge of bail jumping. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). The point here is not that the Legislature should have made forgetting a legal defense. The point is that when a defendant fails to appear simply because he forgot about the hearing, that failure to appear is unrelated to any consciousness of guilt and is thus utterly irrelevant to the question of guilt or innocence on the initial charge. The assumption – that a FTA is an admission of guilt like flight from the

[5] "[Notwithstanding] the uncontrollable circumstances defense [it] is nearly impossible to combat against a bail jumping charge. For example, the defenders conveyed that the "uncontrollable circumstances" defense failed in circumstances where their client had limited means of transportation, including missing court due to a ferry shutdown, and where there were conflicts between court dates. But despite presenting evidence of these circumstances and barriers, defenders reported that these cases resulted in guilty verdicts at trial. Further, survey participants noted that their clients usually missed court because of issues related to indigency and rarely missed court to prevent the administration of justice."

jurisdiction – is simply inapplicable.

3. Transportation failures often cause defendants to miss hearings.

Car breakdowns, traffic,[6] and related transportation problems (snow storms), are other common reasons why defendants sometimes miss their court hearings. *Clark v. State*, 2015 Ark. App. 142, 457 S.W.3d 305 (2015) is illustrative. There the defendant's trial on a charge of breaking and entering a vehicle was scheduled to start at 8:30 a.m. Clark did not arrive at the courthouse until 9:05 and by that time the court had already issued an arrest warrant because he had failed to appear in court at the appointed time. Clark was then charged with the crime of "failure to appear" which was joined with the breaking and entering charge. His motion to sever was denied and he was then tried and convicted of both.

On appeal, Clark argued that he had a reasonable excuse for his failure to be in court at 8:30.[7] Clark also argued that the trial judge erred by denying his motion to sever the FTA charge and the breaking and entering charge. Clark's trial judge made the same comment that Slater's trial judge made when she denied his severance motion: "My view is *his* ***failure to appear*** *is some evidence of* ***consciousness of guilt*** . . . I don't feel as though

[6] Even judges sometimes fail to appear on time because of unanticipated traffic. *See Inaugural Ceremony,* 1 Wn. App. xxi-xxii (1975) where Chief Judge Frank James apologized for his late arrival at the ceremonial opening of the Washington Court of Appeals saying "we ran into a traffic jam on the Floating Bridge."

[7] He testified that he had thought trial was at 9 a.m. *Id.* at 309. He arrived at the courthouse at 9:05 because he had driven to a nearby town in order to shower at a friend's house because he had no water at his own house, and then when driving to court his truck got stuck in the snow. *Id.*

the prejudicial effect of that evidence outweighs the probative value." *Id.* at 309 (emphasis in original). The Arkansas appellate court disagreed: "We agree with Clark that this was not a permissible reason for joinder of the two offenses and that the trial court abused its discretion in denying his motion to sever." *Id.* at 309-10.

4. Mental Illness

Defendants who suffer from mental illnesses often miss court hearings because they are simply unable to adhere to a schedule that requires them to be at a certain place at a certain time. *See*, *e.g., Decriminalizing Non-Appearance, supra*, at 433-34. *State v. Boyd*, 1 Wn. App.2d 501, 408 P.3d 362 (2017) provides a good example of this fact.

Boyd was charged and convicted of failing to register as a sex offender and bail jumping. Convicted of a sex offense in 1999, Boyd simply proved unable to comply with the registration requirement and with the requirement that he attend all court hearings.[8] Charged with failure to register, the trial court initially ordered a competency evaluation because Boyd "rambled incoherently during a pretrial hearing." *Id.* at 506. At his next hearing, the court issued an order, which Boyd signed, setting the next hearing for November 6. But while explaining the order to Boyd the court misspoke and told him that his next hearing was on December 6. Boyd

[8] Although Boyd "largely complied with the registration requirement," over a period of 18 years Boyd pled guilty to the crime of failure to register three times. Because he lacked a permanent residence address, he was required to check in weekly with the local sheriff. He did check in for six straight weeks, but then missed three weeks. The opinion notes that during this period of time he was often sleeping outdoors and acknowledged that "Boyd is homeless, has a 9th or 10th grade education, and is mentally ill." *Id.* at 505.

missed the November 6 hearing and was then charged with bail jumping. *Id.* The charges were tried together and a jury convicted him of both.

Boyd's attorney argued that Boyd's homelessness and mental illness were "barriers" which made it impossible for Boyd to comply with the court's order to attend his next hearing. *Id*. at 518. In rebuttal, the prosecutor argued that Boyd simply chose not to comply and there was no evidence that he lacked the ability to do so. Defense counsel unsuccessfully moved for a mistrial on the ground that the prosecutor "mock[ed] his lawyer's argument, his poverty and his mental illness." The appellate court found that his argument, though made in a disrespectful and unprofessional manner, was not improper because it merely responded to the argument that defense counsel made. *Id.* at 520.

Boyd vividly illustrates the relationships between mental illness, poverty and failures to appear. The assumption that a failure to appear is evidence of the defendant's consciousness of guilt, and is therefore relevant to the other charge, is untenable.

5. Attorney communication problems.

Some FTAs are caused because the defense attorney failed to inform the defendant of the time and date of the hearing. Attorneys make mistakes too. Sometimes they give their clients the *wrong* date.[9] Sometimes, there is friction between a defense attorney and the defendant which leads to a

[9] Sometimes they leave a voice message with the right date, but they dial the wrong phone number and leave the message on the wrong phone. Sometimes they leave the right message on the right phone, but the defendant runs out of cell phone minutes and cannot access his phone messages. This happens frequently with poor defendants who can only afford to buy a limited number of cell phone minutes.

breakdown in their communication. In *Commonwealth v. Babbs*, 499 A.2d 1111, 1114 (Penn. Super. 1985), the Court describes the defendant's "explanation" for his failure to appear by reporting simply that the defendant had an argument with his defense lawyer. While that did not excuse his FTA, the Court noted that it also did not support the inference that the defendant failed to appear because he knew he was guilty and feared that the jury was going to convict him. *Babbs,* 499 A.2d at 1114.[10]

Like Slater, defendant Babbs "had appeared on several occasions," at pretrial hearings but "he failed to appear on a continued trial date." The appellate court flatly refused to label his failure to appear as "flight" noting that "[h]e did not flee or conceal himself, however, and was found shortly thereafter at his known residence." *Id*. While true "flight" – meaning leaving one's usual abode or area of residence – can be evidence of consciousness of guilt which, "may form the basis in connection with other proof from which guilt may be inferred," that rule did not "permit an inference of guilt merely because a defendant has failed to appear for trial." *Id.* at 1113. "A failure to appear on the day set for trial does not have the same connotation as pre-arrest flight or concealment and cannot be said to point unerringly to consciousness of guilt." *Id*.

In *Babbs* the defendant was tried and convicted of robbery. Over his objection, evidence of his FTA was admitted and the jury was told it was free to decide whether to consider his FTA as evidence tending to prove

[10] "We perceive in these circumstances no basis for drawing an inference that appellant's failure to appear on the continued trial date was attributable to a consciousness of guilt."

his guilt of the robbery. The jury convicted the defendant of robbery, but the appellate court reversed holding it was error to admit the FTA evidence. *Babbs*, 499 A.2d at 1114.[11]

B. *JEFFERSON* IS CONSISTENT WITH THE MAJORITY RULE THAT THERE MUST BE MORE THAN A MERE UNEXPLAINED FAILURE TO APPEAR. THERE MUST BE EVIDENCE OF FLIGHT TO AVOID PROSECUTION.

In Mr. Slater's case, the trial court judge erroneously relied on *State v. Jefferson*, 11 Wn. App. 566, 524 P.2d 248 (1974) as support for her ruling denying Slater's motion to sever the bail jumping charge from the violation-of-a-no-contact order charge. But the court misinterpreted *Jefferson* and misread it as holding that evidence of a failure to appear at a hearing in a criminal case is *always* cross-admissible in the trial of the original charge. But it is a serious mistake to read *Jefferson* that broadly.

In *Jefferson* there was much more than a mere failure to appear at hearing. There was also evidence of actual flight.[12] When Jefferson's trial began, the trial judge allowed the State to present evidence that because he failed to appear on the original trial date a warrant was issued for his arrest. *Id.* at 568. "Jefferson testified that he was 'nervous and was afraid and

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[11] "There was not a necessary connection between a mere post-arrest failure to appear for trial and consciousness of guilt. This is particularly true where, as here, the failure to appear was not accompanied by flight and the defendant did not move from or leave his known, permanent place of residence. Therefore, we will reverse and remand for a new trial free from the unavoidable prejudice caused by the irrelevant evidence that appellant had on an earlier occasion failed to appear for trial."

[12] Jefferson was originally charged with possession of cocaine. The drugs were found in a box located under the driver's seat of the car Jefferson was driving when he was stopped for driving erratically. Jefferson claimed that others had driven the car and that he was unaware of the existence of the box found under his seat. 11 Wn. App. at 567.

decided to leave' and that he went to California 'to find a house, find work, because I had no intention of showing up for this court.'" *Jefferson*, at 568.

Although he did object to it in the trial court, *on appeal Jefferson did not even raise the issue* of whether the evidence of his FTA and his flight to California was admissible in the trial of the drug charges. Instead, he assigned error to the prosecutor's closing argument remarks and to the giving an instruction that specifically informed the jury that "flight or attempted flight . . . is a circumstance which you may consider, together with all other circumstances, in determining guilt or innocence." On these facts, this Court affirmed the trial judge's ruling that the prosecutor did not engage in misconduct when he argued that Jefferson's failure to show up for court and his admission that "he had no intention of showing up" was "consistent" with the behavior "of a man who is guilty and knows he is guilty." This Court also held that "though we find no error in this case, we are persuaded that evidence of 'flight' should not be the subject of an instruction" because an instruction created a risk of giving undue emphasis to circumstantial evidence which "tends to be only marginally probative as to the ultimate issue of guilt or innocence." 11 Wn. App. at 571.

Jefferson's FTA was held admissible because it was accompanied by evidence of *actual* interstate flight and an *admission* of an *intent to avoid trial*. This is a far cry from the evidence in this case. Here there is no evidence that Slater ever left the State, the city, or the home he was living in, and no evidence that police ever executed the arrest warrant and forcibly returned him to court. On the contrary, Slater voluntarily appeared before

the court on his own motion to quash the warrant and his motion was granted. CP 102. On these facts, it is impossible to view Slater's FTA as evidence of "flight," or as evidence of "consciousness of guilt."

C. THIS COURT SHOULD DISAPPROVE OF *COBB*. IT WAS DECIDED BEFORE EVIDENCE RULES WERE ADOPTED.

The trial court also apparently relied upon *State v. Cobb*, 22 Wn. App. 221, 589 P.2d 297 (1978). Unlike *Jefferson*, in *Cobb* this Court actually *did* rule on the issue of the admissibility of a FTA in the trial of the original charge. While there are fewer facts in the *Cobb* opinion regarding the defendant's "flight," the opinion does disclose that (1) the defendant was charged with second degree assault, (2) he failed to appear for trial on May 18, 1976, (3) he "was not apprehended until nearly a year later"; and (4) he never offered any explanation for his failure to appear.

Unlike Slater, Cobb was never charged with the crime of "bail jumping."[13] Thus, Cobb was only charged and tried for one criminal offense. Cobb did not argue that the admission of evidence regarding his FTA violated ER 404(b) for the simple reason that the Washington Rules of Evidence did not yet exist.[14] Instead, Cobb argued that the admission of evidence of his FTA violated the rule of *State v. Goebel,* 40 Wn.2d 18, 240 P.2d 251 (1952). In the following language, *Goebel* recognized and applied the rule which, with some exceptions, restricted the admissibility of evidence of other uncharged "crimes" or "offenses." *Goebel*, 40 Wn.2d at

[13] At the time of his FTA, bail-jumping was a brand new crime. RCW 9A.76.170 first became effective in 1975.

[14] They were adopted and went into effect in 1979.

21 (emphasis added). In response to Cobb's contention that evidence of his failure to appear was inadmissible under the rule of *Goebel*, this Court held that his failure to appear was not an "unrelated offense," because it was "related" to his second degree assault:

> [Cobb's] argument is misleading because the court proceedings referred to *did not involve another offense*. It is to be remembered that *this offense* occurred on March 4, the arraignment and trial setting was on March 11, and the trial date set was May 18, all in 1976. The nonappearance involved failure to appear for trial *on this particular offense* and there was further testimony that defendant was not apprehended until nearly a year later.

Cobb, 22 Wn. App. at 224 (italics added).

Whether this parsimoniously narrow construction of the *Goebel* rule was correct or not is no longer of any significance because, as Slater pointed out in his opening brief, the Washington Rules of Evidence were adopted and went into effect after *Cobb* was decided. Those rules include ER 404(b), and that rule of general *in*admissibility is *not* restricted to "crimes" or "offenses." It applies more broadly to all other "crimes, wrongs or acts" and it applies whether or not they are "related" to the charged crime.

A knowing failure to appear in court when required to do so by a court order is not only a "crime," it is also a "wrong" and it is obviously an "act." Under ER 404(b), therefore, evidence of the act of failing to appear in court when ordered to do so – is *not* admissible to prove the character of the person in order to show that he acted in conformity therewith. That means that evidence that Slater failed to obey an order to appear in court is *not admissible* to show that Slater is the type of person who violates court

orders, and that "in conformity" with that general disposition he violated the court order forbidding him to have any contact with his alleged victim just like he violated the order to appear in court for trial.

The adoption of Evidence Rule 404(b) effectively overruled *Cobb*. *Cobb* was premised upon the language of *Goebel* which restricted the rule of nonadmissibility to unrelated crimes. ER 404(b) extended the rule of nonadmissibility to all "other crimes, wrongs or acts." Thus, *Cobb* is no longer good law. Adherence to the narrow rule of *Cobb* to justify the admission of evidence of a failure to appear has been erroneous since 1979 when the Rules of Evidence were adopted. Accordingly, this Court should expressly overrule the *Cobb* decision.

D. MOREOVER, *COBB* IS DISTINGUISHABLE SINCE THERE THE DEFENDANT DID NOT VOLUNTARILY COME BEFORE THE COURT AND MOVE TO QUASH THE OUTSTANDING WARRANT.

Even assuming, *arguendo*, that *Cobb* still has some limited viability, it is easily distinguishable from this case, and from a great many other cases where the defendant takes prompt action to rectify his failure to appear. The *Cobb* opinion stresses the fact that Cobb did *nothing* to get his case back on track after he failed to appear. He simply disappeared for "nearly a year" and waited to see if law enforcement officers came after him. They did. They "apprehended" him "nearly a year later.

Moreover, even after he was arrested, Cobb never offered any explanation as to why he failed to appear for his trial. The *Cobb* opinion asserts that "[t]he rationale which justifies the admission of evidence of

'flight' is that, *when unexplained*, it is a circumstance which indicates a reaction to a consciousness of guilt." *Cobb*, 22 Wn. App. at 225. The opinion notes that there was no "testimony by the defendant even attempting to explain his failure to appear on the date originally scheduled, or to account for his long absence thereafter." *Id.*

Slater, unlike Cobb, did not simply vanish for a year and wait for the police to come and find him. After he missed his trial call hearing on September 8, 2017, Slater "appeared in court a little over a month later to quash his warrant." *Brief of Appellant,* at 1, citing CP 102. Criminal defendants – who know that a warrant has been issued for their arrest because they failed to appear – by voluntarily coming before the court and moving to quash the arrest warrant, cannot logically be viewed as defendants who are purposefully trying to evade trial and conviction by means of "flight." The fact that they are trying to get their case back on track for a trial does not show a "consciousness of guilt." It shows the exact *opposite* of flight. It shows that they are *not* so afraid of trial and the possibility of conviction that they hope to avoid a trial altogether.

Under these circumstances, to rule that a defendant's FTA is admissible evidence on the trial of the original criminal charge is nonsensical. As the *Jefferson* opinion acknowledges, even under circumstances where there has been *real physical flight from the jurisdiction*, the probative value of evidence of such flight on the issue of guilt or innocence is marginal. It is marginal because plenty of *innocent* people are afraid that notwithstanding their actual innocence they still might

be convicted. But in a case where there hasn't been any actual flight, and where the defendant has made a reasonably prompt effort to cure the problems caused by his failure to appear, evidence of the prior failure to appear has zero probative value on the issue of guilt or innocence.

E. THE PROSECUTION DID NOT OBJECT TO SLATER'S RE-RELEASE ON PERSONAL RECOGNIZANCE. THUS, THE STATE DID NOT THINK SLATER WAS A FLIGHT RISK.

The most powerful evidence that Slater's nonappearance had no probative value is the State's response to Slater's motion to quash his warrant. When the prosecution added the charge of Bail Jumping, DPA Dana Little provided a supplemental affidavit of probable cause in which she stated under oath: "The State does not object to release of the defendant on personal recognizance." CP 102. The State cannot now claim that Slater's FTA on September 8, 2017 was evidence of his "flight" when it previously showed it was unconcerned about the possibility of flight and agreed he should be released again without having to post any bail at all.

F. THE LEGISLATURE'S RECENT AMENDMENT TO THE BAIL JUMPING STATUTE SHOWS THAT THE LEGISLATURE HAS DECIDED THAT A DEFENDANT WHO MISSES A COURT HEARING BUT PROMPTLY MOVES TO QUASH HIS WARRANT HAS NOT DONE ANYTHING CRIMINAL AT ALL.

Recently amendments to the Bail Jumping statute show that the Legislature has expressly recognized that many FTA's should not be considered criminal acts at all. ESHB 2231, which took effect on June 11, 2020 (Appendix A), divided Bail Jumping into two separate crimes: Bail Jumping (Section 1) and Failure to Appear (Section 2). Failure to appear

for *trial* on *any* criminal offense, or, if charged with a violent offense or a sex offense, failure to appear for *any* court hearing at which his attendance has been required by court order, constitutes Bail Jumping. If the charge was neither a violent offense nor a sex offense, then the defendant cannot be charged with Bail Jumping for missing a pretrial hearing. Thus, since Violation of a Domestic Violence No Contact Order is neither a violent offense nor a sex offense, the conduct Slater was found to have engaged in no longer constitutes the crime of bail jumping at all.

Slater's conduct now constitutes the crime of Failure to Appear. That crime is "a gross misdemeanor if the person was held for, charged with, or convicted of a felony." (Section 2, Subsection 2). Thus, after June 6, 2020, if Slater engaged in the exact same conduct as was alleged in this case, *at most* he would be guilty of only a gross misdemeanor.

More importantly, for both Bail Jumping and Failure to Appear, if the person who failed to show up in court "makes a motion with the court to quash the warrant" and if that motion is made "within thirty days of the issuance of a warrant for failure to appear," then there is no crime at all. It is only when the person *fails* to make such a motion within that thirty day period that he is guilty of any crime.[15]

Why has the Legislature decided to decriminalize failures to appear if the defendant moves to quash his arrest warrant within 30 days? Because it has recognized that people fail to appear for all kinds of reasons, many of

[15] The record does not reveal when Slater made his motion to quash but from what is in the record (see CP 102) it seems likely that he made his motion within 30 days. Thus, if his FTA had occurred after June 6, 2020, *he would not be guilty of any crime at all.*

which are actually quite reasonable. FTAs are often caused by (1) sickness (2) the inability to get transportation to court; (3) the inability to find child care; or (4) a determination that missing a day of work in order to attend a court hearing will lead to losing one's employment. The Legislature recognized that as long as a defendant promptly contacts the court and makes a motion to quash the warrant, it simply makes no sense to criminally punish him for his FTA. It is a waste of money and court time, and *it isn't evidence that he knows that he is guilty* of the charge that was pending.

The Legislature's recognition that a defendant who takes responsibility for his FTA should not be charged with a crime is congruent with the common sense observation made in *Jefferson* that a defendant who leaves the State with no intention of ever returning to face the prosecutorial music *actually did* engage in flight, and thus *his* conduct actually does have some "marginal" probative value on the issue of guilt or innocence.

In cases where the bail jumping charge is joined for trial with the original charge, the question arises as to whether a severance should be ordered because the minimal probative value of the bail jumping charge on the other charge is outweighed by what the New Jersey Supreme Court called the "devastatingly prejudicial effect" of allowing the jury to infer guilt from such speculative "evidence." *Ingram*, 951 A.2d at 1015. This Court should join with the majority of courts in this country by holding that there should be a presumption that a severance motion should be granted. Absent strong evidence that the defendant not only failed to appear, but actually fled to avoid prosecution, denial of a motion to sever should be held

an abuse of discretion.

G. ALLOWING BAIL JUMPING CHARGES TO BE TRIED TOGETHER WITH THE ORIGINAL CHARGE PROVIDES THE PROSECUTION WITH A TOOL TO ENGAGE IN COERCIVE PLEA BARGAINING.

Under the SRA, when the defendant is convicted of multiple current offenses, absent a "same criminal conduct" determination, each conviction elevates the defendant's point score on all the other current offenses. This, in turn, leads to an increase in the standard range. Thus, by charging felony bail jumping and joining it with the original charge or charges, the prosecutor can cause significant increases in the defendant's prison sentences on all current counts.

By adding a point to the Offender Score and increasing the standard range, adding a Bail Jumping charge turns up the pressure to enter into a plea bargain. Frequently, the terms of that bargain are simply to dismiss the Bail Jumping charge in exchange for a guilty plea to the original charge. Research in other States indicates that prosecutors frequently add Bail Jumping charges for just this reason. If the defendant rejects a plea bargain offer, and thereafter misses a hearing, the prosecutor's addition of a Bail Jumping charge significantly raises the stakes. If the defendant goes to trial gambling on an acquittal on the original charge, and *loses* that gamble, his sentence for that crime will be much longer. And even if he is acquitted of the original charge, he will almost certainly be found guilty of the Bail Jumping charge. So in exchange for dropping the Bail Jumping charge, the defendant caves in to the pressure and agrees to plead guilty. Thus, perhaps

simply because the defendant's car broke down on the way to court, or because he was afraid that he would lose his job if he went to court instead of to work, the prosecutor gets a conviction that she might not otherwise have gotten if she had had to prove the original charge in a trial.

Using Bail Jumping charges to coerce guilty pleas is a common practice.[16] Washington public defenders report "that prosecutors routinely threaten to file bail jumping charges and that the bail jump charge is a key charge that prosecutors use in plea negotiations." *Decriminalizing Non-Appearance, supra*, at 465. Washington defenders report that their clients feel forced into accepting plea bargains and that they are being punished for behavior that they cannot avoid. *Id.* at 467-68.[17]

H. PENALIZING EXERCISE OF THE RIGHT TO SILENCE.

The record in this case shows that the prosecutor's closing argument included *at least* an *implicit* comment on the defendant's constitutional right to remain silent. RP 220 ("If he didn't do it, why didn't he show? Why did he take a month and a half? ***There's no evidence that he mistook his date."***

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[16] One study determined that "While not conclusive as to causation, the correlation between bail jumping charge dismissals and pleas to other charges cannot be ignored." A. Johnson, *The Use of Wisconsin's Bail Jumping Statute*, 2018 WIS. L. REV. 619, 654.

[17] "One client missed court because she had to take her sick child to the doctor. Because the client, herself, was not sick, she faced bail jumping charges. Another defender described a client who had significant challenges due to her physical disability which led to multiple missed court dates. Despite awareness of these challenges due to the client's physical disability, the prosecutor threatened to charge the client with several bail jumping charges until the client felt that she had no other choice than to plead guilty to the underlying charge. . . . Even though prosecutors have discretion in charging decisions, there is an indication that this specific charge pressures defendants who may want to contest their charges or are factually innocent, increases sentencing implications, and punishes people for missing court under legitimate circumstances."

(emphasis added). The defendant is the only person in the world who could provide evidence that he "mistook his date." Emphasizing that point, the prosecutor identified the defendant as that person when he commented that there was no evidence that "***he***" mistook the date. RP 236.[18]

Comment on the defendant's failure to testify is a classic example of prosecutorial misconduct. *See, e.g., State v. Sargent*, 40 Wn. App. 340, 347, 698 P.2d 598 (1985). In bail jumping cases, whenever the defendant fails to testify (as in this case), the temptation to comment on the defendant's failure to explain his FTA will frequently lead prosecutors to cross the Fifth Amendment line by commenting, either directly or indirectly, on the absence of an explanation that only the defendant could possibly provide. But even if the prosecutor avoids making any unconstitutional comment on the defendant's silence, jurors will inevitably think about the fact that the defendant has not explained why he failed to appear. In either case, many jurors will simply not be able to avoid, consciously or unconsciously, considering the defendant's "failure to explain" his FTA as circumstantial evidence that he is guilty.

III. CONCLUSION

For these reasons, amicus urges the Court to rule that motions to sever bail jumping and FTA charges from the original charges should nearly always be granted.

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[18] "Would a reasonable person sign on the dotted line saying, I'm going to be there on September 8th, after he had been signing multiple documents. . . and not know that he didn't [sic] have to be there? ***And if he didn't know, how did he show up a month and a half later? How did he know he had anything to quash?"*** (Emphasis added). By using the pronoun "he" the prosecutor called out the defendant as the person who failed to testify.

Respectfully submitted this 29th day of December, 2020.

CARNEY BADLEY SPELLMAN, P.S.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 29th day of December, 2020.

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APPENDIX A

ENGROSSED SUBSTITUTE HOUSE BILL 2231

AS AMENDED BY THE SENATE

Passed Legislature - 2020 Regular Session

State of Washington 66th Legislature 2020 Regular Session

By House Public Safety (originally sponsored by Representatives Pellicciotti, Hudgins, Appleton, Davis, Gregerson, Santos, Frame, Pollet, Fitzgibbon, Thai, Bergquist, Ormsby, Wylie, Pettigrew, Peterson, and Riccelli)

READ FIRST TIME 02/05/20.

AN ACT Relating to bail jumping; amending RCW 9A.76.170; adding a new section to chapter 9A.76 RCW; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 9A.76.170 and 2001 c 264 s 3 are each amended to read as follows:

(1) ((~~Any person having been~~)) A person is guilty of bail jumping if he or she:

(a) Is released by court order or admitted to bail ((~~with knowledge~~)), has received written notice of the requirement of a subsequent personal appearance for trial before any court of this state, and fails to appear for trial as required; or

(b)(i) Is held for, charged with, or convicted of a violent offense or sex offense, as those terms are defined in RCW 9.94A.030, is released by court order or admitted to bail, has received written notice of the requirement of a subsequent personal appearance before any court of this state or of the requirement to report to a correctional facility for service of sentence, and ((~~who~~)) fails to appear or ((~~who~~)) fails to surrender for service of sentence as required ((~~is guilty of bail jumping~~)); and

(ii)(A) Within thirty days of the issuance of a warrant for failure to appear or surrender, does not make a motion with the court

to quash the warrant, and if a motion is made under this subsection, he or she does not appear before the court with respect to the motion; or

(B) Has had a prior warrant issued based on a prior incident of failure to appear or surrender for the present cause for which he or she is being held or charged or has been convicted.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances ((~~in reckless disregard of~~)) by negligently disregarding the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony; or

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

NEW SECTION. **Sec. 2.** A new section is added to chapter 9A.76 RCW to read as follows:

(1)(a) A person is guilty of failure to appear or surrender if he or she is released by court order or admitted to bail, has received written notice of the requirement of a subsequent personal appearance before any court of this state or of the requirement to report to a correctional facility for service of sentence, and fails to appear or fails to surrender for service of sentence as required; and

(b)(i) Within thirty days of the issuance of a warrant for failure to appear or surrender, does not make a motion with the court to quash the warrant, and if a motion is made under this subsection, he or she does not appear before the court with respect to the motion; or

(ii) Has had a prior warrant issued based on a prior incident of failure to appear or surrender for the present cause for which he or she is being held or charged or has been convicted.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, that the person did not contribute to the creation of such circumstances by negligently disregarding the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(3) Failure to appear or surrender is:

(a) A gross misdemeanor if the person was held for, charged with, or convicted of a felony; or

(b) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

--- END ---

CARNEY BADLEY SPELLMAN

December 29, 2020 - 12:50 PM

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